IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-782

GATEWAY COAL COMPANY,
Petitioner,

vs.

UNITED MINE WORKERS OF AMERICA, ET AL.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

The Chamber of Commerce of the United States of America respectfully moves for leave to file a brief *amicus curiae* in support of the petition for certiorari filed by Gateway Coal Company.[1] In support of this motion, the Chamber states:

1. The Chamber is a federation of more than 3,700 state and local chambers of commerce and trade associations, with an underlying membership of more than 5,000,000 business firms. It is the largest association of business and professional organizations in the United States.

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1. Pursuant to Rule 42 of the Rules of this Court, the Chamber requested consents from all parties to the filing of a brief *amicus curiae*. Counsel for Petitioner gave such consent, but counsel for the United Mine Workers of America declined to do so. Counsel for the other respondents has not responded to the Chamber's request.

2. The first question raised in this case—whether a grievance not specifically excluded by the parties from arbitration may nevertheless be found non-arbitrable and thereby preclude enjoining a strike in violation of a contractual no-strike agreement—is a matter of substantial concern to the Chamber. This Court has held that, "apart from matters that the parties specifically exclude[d], *all* of the questions on which of the parties disagree[d] . . . [came] within the scope of grievance and arbitration provisions of the collective agreement." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 581 (1960) (emphasis added). Moreover, a strike "over a grievance which both parties are contractually bound to arbitrate" is enjoinable in federal court. *Boys Markets* v. *Retail Clerks Union*, 398 U. S. 235, 254 (1970). Recent cases, however, have unsettled this law and threatened to erode these principles.[2] The instant case is an appropriate vehicle, therefore, for this Court to examine the continuing validity of its Trilogy decisions[3] and determine whether, contrary to those decisions, arbitration should be replaced by economic warfare as the desired method of settling industrial disputes.

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2. See, e.g., in addition to the instant case, *Amstar Corporation* v. *Amalgamated Meat Cutters*, ... F. 2d ..... 81 LRRM 2644, 2645 (5th Cir. Nov. 6, 1972), where the court held that, since "[t]he *Boys Markets* holding was a 'narrow one,'" a district court had no power to enjoin a strike and compel arbitration "when the legality of the strike sought to be enjoined is the alleged arbitrable dispute." Cf., however, *International Union of Operating Engineers Local 150* v. *Flair Builders, Inc.*, ... U. S. ....., 32 L. Ed. 2d 248, 252 (1972), holding that where "the parties are subject to an agreement to arbitrate, and that agreement extends to 'any difference' between them, then a claim that particular grievances are barred by laches is an *arbitrable question* under the agreement." (emphasis added).

3. *United Steelworkers of America* v. *American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co., supra; United Steelworkers of America* v. *Enterprise Corp.*, 363 U. S. 593 (1960). These decisions are commonly referred to as the Trilogy.

3. The other issue presented—whether a concerted refusal to work because of a subjective apprehension of danger is protected under Section 502 of the National Labor Relations Act (29 U. S. C. § 143)—is also a matter of far-reaching importance. Prior to the decision below, the "controlling factor" in determining the applicability of Section 502 to work stoppages was "not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances be considered abnormally dangerous." *Redwing Carriers,* 130 NLRB 1208, 1209 (1961). The court below, however, would establish, as Judge Rosenn noted in his dissent (App. C, p. 22a), a "new test . . . that '[i]f employees believe that correctible circumstances are unnecessarily adding to the normal dangers of their hazardous employment . . .,' they need not arbitrate." This novel approach, occurring in an area of numerous disputes,[4] fails to harmonize the Act with other federal and state legislation specifically designed to deal with occupational health and safety.[5] It raises an issue of major and recurring significance which warrants review by this Court.

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4. See, e.g., *American Oil Company,* 51 LA 484 (1968); *United States Steel Corporation,* 51 LA 571 (1968); *A. G. Suitor Construction Co.,* 52 LA 599 (1969); *Carmet Co.,* 52 LA 790 (1969); *Phillips Pipe Line Co.,* 54 LA 1019 (1970); *United States Steel Corp.,* 55 LA 61 (1970); *Alaska Lumber & Pulp Company, Incorporated,* 70-2 ARB ¶ 8707 (1969); *Hill Acme Company,* 70-2 ARB ¶ 8774 (1970); *International Salt Company,* 63-2 ARB ¶8680 (1963); *H. O. Canfield of Virginia, Inc.,* 63-2 ARB ¶ 8714 (1963); *Joseph T. Ryerson and Son, Inc.,* 63-2 ARB ¶ 8815 (1963); *The Cleveland Newspaper Publishers Association,* 64-3 ARB ¶ 9122 (1963); *American Saint Gobain Corporation,* 66-2 ARB ¶ 8606 (1966).

5. See, e.g., the Occupational Safety and Health Act of 1970, 29 U. S. C. § 651 *et seq.;* the Coal Mine Health & Safety Act, 30 U. S. C. § 801 *et seq.;* and, with respect to this case, Pa. Stat. Ann., Tit. 52, § 70-101 *et seq.*

For the foregoing reasons, the Chamber respectfully requests leave to present its views.

Respectfully submitted,

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BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

This brief *amicus curiae* is filed on behalf of The Chamber of Commerce of the United States of America contingent upon the Court's granting the foregoing motion for leave to file a brief *amicus curiae.*

INTEREST OF THE AMICUS CURIAE

The interest of the Chamber is set forth in its annexed motion for leave to file a brief *amicus curiae.*

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Conflicts with the Principle Established by This Court That All Grievances Arising Under a Labor Agreement Are Arbitrable Thereunder Unless Specifically Excluded.

1. This Court has repeatedly "emphasized the importance of arbitration as an instrument of federal policy for resolving disputes between labor and management and [has] cautioned the lower courts against usurping the functions of the arbitrator." *Boys Markets* v. *Retail Clerks Union*, 398 U. S. 235, 243 (1970). Accordingly, "an order to arbitrate the particular grievance should not be denied unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," and that "only the most *forceful evidence* of a purpose to exclude the claim should prevail." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574, 582-583, 584 (1960) (emphasis added). See also *Teamsters Local 174* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), where, even in the absence of an explicit contractual provision, this Court implied an agreement not to strike; and the other similar decisions noted in the petition (p. 16, n. 5). The controlling principle, in short, has been that unless arbitration of a grievance is specifically *excluded* by the parties, the dispute is arbitrable.

The court below disregarded these precepts. Notwithstanding the absence of an express exclusion, the decision below created its own exception to the parties' broad

arbitration agreement.[1] The court thus took a diametrically opposite view to the Trilogy and other decisions noted above. It placed the burden on the party seeking arbitration to show that a dispute was specifically *included*, that the parties either "particularly stated [or] unambiguously agreed" (App. C, p. 16a) that the dispute would be arbitrable. This decision, particularly when coupled with a recent similar view taken by the Fifth Circuit,[2] creates a sharp dislocation in industrial relations. Judges and arbitrators alike have been left with conflicting interpretations about their responsibilities with respect to contractual arbitration and no-strike provisions. The result, with its encouragement of "strikes, lockouts and similar devices" (*Boys Markets*, 398 U. S. at 252) as a "fang and claw"[3] alternative to arbitration, is surely inconsistent with the Act's purpose of promoting "industrial peace and stability" rather than "industrial strife." *Carey* v. *West-*

1. The contract in this case contains an arbitration provision providing that "all disputes and claims which are not settled by agreement shall be settled by arbitration" (App. C, p. 6a), a clause virtually identical to that involved in *Boys Markets*. See 398 U. S. at 237, n. 1.

2. See *Amstar Corporation* v. *Amalgamated Meat Cutters*, ... F. 2d ..... 81 LRRM 2644, 2645 (5th Cir. Nov. 6, 1972), where the court held that, since "[t]he *Boys Markets* holding was a 'narrow one,'" a district court had no power to enjoin a strike and compel arbitration "when the legality of the strike sought to be enjoined is the alleged arbitrable dispute." Cf., however, *International Union of Operating Engineers Local 150* v. *Flair Builders, Inc.*, ... U. S. ....., 32 L. Ed. 2d 248, 252 (1972), holding that where "the parties are subject to an agreement to arbitrate, and that agreement extends to 'any difference' between them, then a claim that particular grievances are barred by laches is an *arbitrable question* under the agreement." (emphasis added).

3. As an early commentator noted, "Industrial peace is not a God-given product. It must be cultivated and worked for constantly. . . . Conciliation, mediation and voluntary arbitration are the marks of civilization. They are the enemies of distrust and force. They do away with the fang and claw." McGrady, *Industrial Peace: A Joint Enterprise*, 2 Arb. Journal 339, 343 (1938).

inghouse Electric Corporation, 375 U. S. 261, 274 (1964). This Court, it is submitted, should utilize the present case as an appropriate vehicle to clarify this important area of the law.

2. The decision below further erodes the Trilogy by disregarding the admonition that here, as in every arbitration situation, "it is the arbitrator's construction which was bargained for; . . . and the courts have no business overruling him because their interpretation of a contract is different from his." *Enterprise Corp.*, 363 U. S. at 599.[4] The court of appeals, however, overturned the arbitrator's decision in this case as well as the determination of the Pennsylvania Department of Environmental Resources and substituted, in lieu of these informed opinions, its own view as to the resolution of the parties' dispute—a determination which, as Judge Rosenn observed, "solves nothing" (App. C, p. 24a). The denigration of the arbitration process thus occasioned is significant. The arbitration clause in the present case is representative of the provisions usually found in collective bargaining agreements. Few such contracts either restrict arbitration or expressly provide for the arbitration of particular grievances.[5] Clearly, therefore, regardless of the post-litigation alteration of

4. *In Collyer Insulated Wire*, 192 NLRB No. 150, 77 LRRM 1933, 1934 (1971), the National Labor Relations Board recently recognized that disputes arising under a labor agreement "can better be resolved by arbitrators with special skill and experience in deciding matters arising under established bargaining relationships than by the application by this Board of a particular provision of our statute." Accordingly, the Board held that it will defer, in certain circumstances, "to the arbitration clause conceived by the parties." 77 LRRM at 1936. See also *Rios* v. *Reynolds Metal Co.*, ... F. 2d ....., 5 FEP Cases 1 (5th Cir. Sept. 20, 1972), which enunciated a similar policy of deferral under Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000-e, *et seq.*).

5. "About 94% of contracts provide for arbitration of grievances not settled by the parties themselves." 51 *Collective Bargaining—Negotiations and Contracts*, p. 6 (Washington, D. C.: BNA, Inc. 1970). Of these contracts, only 38% contain any limitation upon the scope of arbitration. Restriction of safety dispute arbitra-

the parties' bituminous coal agreement (see pet., n. 6), this case raises a significant issue.

3. In *Boys Markets*, this Court made no distinction, as does the court below (App. C, p. 18a, n. 1), between the arbitration of economic and safety disputes; or differentiated between the case *sub judice* and other controversies as in *Amstar*. "Having agreed to the broad [arbitration] clause, [the parties] are obligated to submit," as this Court indicated just this year in *Flair Builders*, all of their claims and defenses to "the arbitral process." 32 L. Ed. 2d at 252. This rule is consistent with settled industrial practice. Grievances involving disputes arising out of alleged dangerous working conditions, for example, are grist for the arbitrator's mill.[6] The decision below thus undermines sound industrial relations practice as established over a period of many years by union and employer representatives actively involved in day-to-day labor relations. It raises an issue, therefore, which is worthy of this Court's attention.

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tion, the issue involved in this case, is so minimal that the Bureau of National Affairs in the above study did not even list safety disputes as one of the "prevalent exclusions" from arbitration. Further, in the most recent study prepared for the Bureau of Labor Statistics of the Department of Labor, only "about 5% of the grievance provisions, covering 9% of the workers, . . . listed one or more specific issues that were excluded from the grievance process." None of these issues related to safety disputes. See Solby & Cunningham, *Grievance Procedures in Major Contracts*, BLS Bulletin 1425-1 (Department of Labor, Bureau of Labor Statistics, 1965).

6. The Commerce Clearing House, Labor Arbitration Awards Series, has published, since 1961, more than 100 awards dealing with safety disputes. The Bureau of National Affairs, Labor Arbitration Series, has published more than 50 awards since 1963 on the same subject. Many, if not the majority, of these awards concern the issue of whether, under a particular contract, employees may engage in a work stoppage when exposed to alleged dangerous working conditions, the very issue in this case. See Labor Arbitration, Cumulative Index and Digest, BNA Nos. 118.658 and 124.70; Labor Arbitration Awards, Commerce Clearing House, Topical Index Digest, Topic: Safety; and the cases noted in the annexed motion at n. 2.

4. The decision below is also in conflict with the decision of the Eighth Circuit in *Hanna Mining Co.* v. *Steelworkers*, ... F. 2d ....., 80 LRRM 3268 (July 21, 1972). In *Hanna*, the court found that a safety dispute was arbitrable and enjoined a walkout. The Eighth Circuit attempted to distinguish the decision below on the ground that the *Hanna* agreement, in contrast to the agreement involved here, specifically required that safety disputes be submitted to arbitration. This, the Chamber submits, is a tenuous distinction.[7] The *Hanna* decision is consistent with the requirement of the Trilogy decisions, as well as with *Flair Builders* and the other cases noted above, that a grievance must be arbitrated absent "forceful evidence" of an intent to exclude such a controversy. The instant decision, however, is wholly at odds with that requirement. There is, therefore, a clear conflict between the circuits which should now be resolved.

II.

The Interpretation of Section 502 of the Act by the Court Below Conflicts with Prior Interpretations and Raises a Matter of Significant First Impression Before This Court.

Wholly apart from the foregoing issues, the instant decision raises a question of first impression in the important area of occupational health and safety. Indeed, review of this case would clarify the appropriate balance between the rights and duties of employees and employers under the National Labor Relations Act with their rights and duties under the Occupational Safety and Health Act and other similar federal and state legislation.

1. The National Labor Relations Board and every court

7. The court below held that "a dispute concerning the safety of the place and circumstances in which employees are required to work is *sui generis*. The present case exemplifies the special and distinguishing character of the safety disputes." App. C, p. 16a. The court below would thus have reached the same result *even if* the instant contract had expressly required the arbitration of safety disputes.

which heretofore considered the application of Section 502 to a work stoppage over alleged "abnormally dangerous working conditions" interpreted that "term [to] contemplate . . . an objective as opposed to a subjective test." *Redwing Carriers,* 130 NLRB 1208, 1209 (1961). The controlling factor was "not the state of mind of the employee or employees concerned, but whether the actual working conditions shown to exist by competent evidence might in the circumstances reasonably be considered 'abnormally dangerous.'" *Stop & Shop Inc.,* 161 NLRB 75, 76, n. 3 (1966).[8] The court below, however, would allow the employees themselves to determine whether a safety hazard exists. See *United States Steel Corp.* v. *United Mine Workers,* ..... F. 2d ....., 69 LC ¶ 13,132 (3d Cir. Nov. 6, 1972). In its view, a "refusal to work because of a *good faith apprehension* of physical danger is protected activity and not enjoinable, even where the parties have subscribed to a comprehensive no-strike clause in their labor contract." App. C, p. 17a (emphasis added). This subjective approach, as both the petition (p. 16) and the dissent below (App. C, p. 22a) note, will have a dangerous impact upon the stability of labor relations. As the instant case illustrates, this rule will permit employees to subvert any no-strike agreement merely by their "naked assertion" that a work stoppage was caused by an "apprehension of danger."

2. The approach of the court below is particularly anachronistic in light of the substantial state and federal legislation governing industrial safety. There is now a comprehensive statute, the Occupational Safety and Health Act of 1970, 29 U. S. C. § 651 *et seq.*, which regulates safety in all enterprises employing at least 25 persons, as well

8. See also *Curtis Mathes Manufacturing Company,* 145 NLRB 473 (1963). Fruin-Colnon Company, 135 NLRB 737 (1962), *enf'd.* 303, F. 2d 492 (3rd Cir. 1964), *cert. den.* 379 U. S. 833, 841 (1964); *N. L. R. B.* v. *Knight Morley Corp.,* 251 F. 2d 753 (6th Cir. 1957), *cert. den.* 357 U. S. 927 (1958); *Philadelphia Marine Trade Association,* 138 NLRB 737, *enf'd.* 330 F. 2d 492 (3rd Cir. 1964), *cert. den.* 379 U. S. 833, 841 (1964).

as extensive coal mine health and safety legislation.[9] These laws were carefully designed so as not to interfere with collective bargaining and the delicate relationship of parties to a labor agreement. The decision below, in failing to give any credence to the determinations of both federal and state mine inspectors, disrupts this desired harmony. It has raised, therefore, an important question of statutory accomodation in an emerging area of national labor policy.

CONCLUSION.

For all the foregoing reasons, and for the reasons set forth in the petition for writ of certiorari, the Chamber respectfully urges this Court to grant certiorari.

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9. Both the federal Coal Mine Health and Safety Act (30 U. S. C. § 801, *et seq.*) and the Pennsylvania Statutes (Pa. Stat. Ann., Tit. 52, § 70-101 *et seq.*) provide remedies for the correction of the alleged safety problems involved in this case. The former Act is a "very technical and scientific piece of draftsmanship," a "truly comprehensive piece of legislation." Furthermore, "Pennsylvania has provided the best overall standards for mine safety in the nation" and has "the lowest injury rate in both fatal and non-fatal accident categories" of any of the four leading coal-producing states. See Comment, *The 1969 Coal Mine Health and Safety Act: A Survey of Mine Safety Legislation in Pennsylvania,* 31 U. Pitt. L. Rev. 665, 669, 673 (1970).